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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-710

EUGENE L. SMALDONE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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The Brief for the United States in Opposition was filed well after the expiration of an extension of time granted by the Clerk.[1] While such an untimely filing

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[1] The Petition was filed on October 30, 1973, and was received by the Government on October 31, 1973. The Government's response was thus due on December 20, 1973. On timely application, the Clerk on December 14, 1973, granted the Solicitor General's request for an extension of time within which to file a response to and including January 4, 1974.

The Government's Brief in Opposition was in fact filed on January 24, 1974, without any request for additional time beyond January 4 and without benefit of any motion for leave to file an untimely response.

is not a jurisdictional defect, the Court may wish to consider some form of sanction against the Government. The late filing is not unique to this case nor an isolated instance of the Government's dilatoriness. Repeated late filings by the Solicitor General, particularly in criminal cases, cause both (a) a delay in this Court's consideration of such cases, and (b) an unnecessary delay in the rendition of ultimate appellate justice for those convicted of federal offenses. This latter consideration is especially pertinent here since Petitioner has been (and is now) in custody throughout the appellate process.

In any event, the Government's late response in this case contains several misconceptions about the questions presented in the Petition and the reasons why these questions deserve review by this Court. To remove these misconceptions, this short reply is necessary.

I

The Government's opposition serves only to add to the confusion surrounding the efforts of various Circuits to apply Mr. Justice White's suggestion in his concurrence in *Smith* v. *Illinois,* 390 U.S. 129, 133-34, (1968). That suggestion, as yet not approved by this Court, is that a defendant's constitutional right to inquire as to the present address of a principal Government witness disappears upon a showing by the Government or the witness that his personal safety might be endangered if his whereabouts are revealed.

(a) The Government's brief (Op. Br. 4-6), like the opinion below, totally ignores Mr. Justice White's predicate that the burden is on the Government or the witness "at the very least [to] come forward with some

showing of why the witness must be excused from answering the question." Only after such a showing has been made, said Mr. Justice White, can the trial judge "then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling."

Yet the Government would seemingly have the burden shifted to the defendant to show that, in the particular factual circumstances, denying him the right to inquire as to the witness' address would somehow affect his "substantial rights." (Op. Br. 6).[2] By thus removing from the prosecution or the witness the burden of showing the potential of harm, the Government would render it difficult if not impossible for the trial judge to exercise a truly "informed discretion" in evaluating an objection to such an inquiry. Indeed, the Government goes so far as to suggest (Op. Br. 5, fn. 5) that the trial judge, unaided by any claim or showing of potential harm to the witness, "need not spell out the grounds" for restricting the scope of cross-examination; it is said to be enough if his ruling can somehow be "supported by any valid ground."

(b) The ultimate confusion instilled by the Government's position is to be found in its search for evidence

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[2] The Government argues (Op. Br. 5) that in this case the defense subjected the prosecution witness Nocenti to "an extensive cross-examination" respecting his occupation and background as a paid informer. Hence, the argument continues, there was no "further need" to place Nocenti in the context of his environment by asking his present address. But precisely that argument was advanced by the Government and rejected by this Court in *Alford* v. *United States*, 282 U.S. 687, 691 (1931). There are values involved in permitting an inquiry as to the witness' address that have no counterpart in other forms of cross-examination. See *Smith* v. *Illinois*, 390 U.S. at 131.

outside the trial record for "any valid ground" that can be said to lend support to the trial judge's otherwise unsupportable refusal to permit the inquiry as to the witness' address. Not content with the three items outside the record relied upon by the Tenth Circuit (see Petition, p. 18), the Government now adds (Op. Br. 4, fn. 4) the bizarre notion that the witness' fear for his personal safety was "presumably . . . connected with petitioner's unsavory reputation" as allegedly acknowledged by Petitioner in a change of venue motion filed in another unrelated federal prosecution. The basic question thus raised is whether a defendant may be denied his constitutional right to inquire as to the address of a witness without any claim or proof of potential danger having been made before the trial judge and without affording the defendant the opportunity to refute the out-of-court considerations that an appellate court later thinks sufficient to sustain the trial judge's summary ruling.[3]

II

With respect to Petitioner's contention that he was entitled under the Jencks Act to the production of the United States Attorney's interview notes made prior to trial, the Government suggests only (Op. Br. 6) that the conflicting ruling of the District of Columbia Circuit in *Saunders* v. *United States,* 316 F.2d 346, merely remanded for a hearing to determine if such

[3] Despite the confusion that marks the opinion below, that opinion has already been cited by the Seventh Circuit in support of the statement that "There are occasions, of course, when compelling reasons, such as concern for the safety of a witness, may justify curtailing even this preliminary inquiry." *United States* v. *Ott,* No. 73-1251, 7th Cir., Dec. 5, 1973, slip opinion p. 7 at fn. 11.

notes contained any producible material. If that indeed be the purport of the *Saunders* ruling, the conflict with the decision below remains viable. The refusal of the Tenth Circuit to remand the instant case for such a hearing cannot be squared with the order in *Saunders.*

Moreover, nothing in this Court's decision in *Augenblick,* 393 U.S. 348, bears out the Government's claim (Op. Br. 6) that *Saunders* was there "implicitly disapproved." This Court in *Augenblick* simply found the record there to be too imprecise to warrant a ruling as to when prosecutor's notes are producible under the Jencks Act. That is the problem that is here presented inescapably on a precise record. It deserves resolution now by this Court.

III

The Government asserts (Op. Br. 7) that the conflicts among the Circuits as to the instruction to the jury on the issue of specific intent (see Petition, pp. 22-24) "reflect differences in the context in which the specific-intent instruction was given, not a disagreement about the validity *per se* of that instruction."

It is sufficient to note that the Fifth Circuit in *Mann* v. *United States,* 319 F.2d 404, 410, held that this instruction was in effect invalid *per se* and that

> "Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that to leave the jury with that part of the charge complained of in this case was not cured by what was said elsewhere in the charge. Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one."

Thus the conflict on the issue of the specific intent instruction is of the direct and irreconcilable variety that justifies the grant of certiorari.

CONCLUSION

The other contentions advanced in the Government's opposition brief need no reply at this juncture. Suffice it to say, however, that the considerations advanced by the Petitioner in this reply brief, supplementing those set forth in the Petition, fully justify the grant of certiorari to review the judgment and opinion below.

Respectfully submitted,

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